Supreme Court, U.S.
FILED

06-661 NOV 7 - 2006

OFFICE OF THE CLERK

No. ——

In the Supreme Court of the United States

ALFRED M. ADAMS,
an Arizona resident,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Federal Tort Claims Act ("FTCA"), there is no cause of action against the federal government for defamation. ***28 U.S.C. § 2680(h)***. The FTCA also ***requires*** federal courts to apply the substantive law of the state where the victim was injured. ***28 U.S.C. § 1346(b)***. Despite that fact, the lower courts in this case refused to apply substantive Arizona law holding that the false-light invasion of privacy tort is different and distinct from defamation.

Thus, the "question presented" is:

In a FTCA case, where substantive state law clearly holds that the false light invasion of privacy tort is a cause of action distinct and different from defamation, can the federal courts ignore substantive state law and hold that false-light invasion of privacy is merely defamation under a different name, and therefore barred by the Federal Tort Claims Act?

PARTIES TO THE PROCEEDING

The parties to the proceeding before this Court are:

The petitioner is Alfred Adams, a resident of the State of Arizona.

The respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review certain orders of the United States District Court for the District of Arizona and of the Untied States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

There are three rulings Petitioner asks this Court to review: (1) The August 12, 2004 Order and Judgment of the United States District Court for the District of Arizona dismissing the complaint against the United States government for false light invasion of privacy filed by Petitioner (hereafter "Adams"); (2) the June 28, 2006 Memorandum Decision of the United States Court of Appeals for the Ninth Circuit affirming the district court; and (3) the August 10, 2006 Order of the Ninth Circuit denying the petition for rehearing and the petition for rehearing en banc.

JURISDICTION

This Court has jurisdiction pursuant to ***28 U.S.C. § 1257(a)*** and ***Rule 13(a), Rules of the Supreme Court***, because the ultimate Order for which review is sought was filed by the United States Court of Appeals for the Ninth Circuit on August 10, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346(b)(1): Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have

exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680(h): The provisions of this chapter and section 1346(b) of this title shall not apply to . . . (h) Any claim arising out . . . libel [or] slander . . . .

STATEMENT OF THE CASE

This is a simple case – but of extraordinary national importance – since it involves the fundamental question of what substantive tort law district courts must apply in Federal Tort Claims Act cases – the substantive law of the state where the tort occurred, or the law the district court or court of appeals happens to believe is the best law to use.

This case is about a pilot who made a daring crash landing that preserved his aircraft and the lives of all on board. Later, in violation of its own regulations, the Federal Aviation Administration released a critical report that placed Plaintiff in a false light, invading his right of privacy as protected under the substantive law of the State of Arizona. Plaintiff cannot sue the United States for libel, slander or defamation, and did not even try to do that. But there is no prohibition against suing the United States for false-light invasion of privacy, which, under substantive Arizona common law, is a different, separate and distinct tort.

Nevertheless, the district court and the court of appeals held that the FTCA barred the false light invasion of privacy tort claim, because, in its opinion, a false light tort claim was merely defamation or slander by another name, despite the fact that substantive Arizona law is directly to the contrary.

The accident and the false light invasion of privacy

These are the facts alleged in the complaint, which this Court must accept as true,[1] since the complaint was terminated by a motion to dismiss: On November 7, 1992, Adams was piloting an airplane that had an emergency while landing at Sky Harbor International Airport in Phoenix, Arizona. (Complaint, ¶ 7) Adams skillfully and successfully landed the aircraft, despite severe equipment problems. (Complaint, ¶ 8) He saved the lives of all on board and saved the plane from severe damage. (Complaint, ¶ 9)

Officers, employees and/or agents of the Federal Aviation Administration ("FAA") wrongfully disclosed to the media in the Phoenix metropolitan area incorrect and damaging information concerning alleged fault of Adams in connection with the aircraft's landing. (Complaint, ¶ 10) This release of incorrect and damaging information was ***not*** discretionary, but was done in contravention of guidelines, policies and procedures of the federal government relating to such matters. (Complaint, ¶ 11) The federal government thus gave publicity to matters about Adams that placed him before the

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[1] ***Gompper v. VISX, Inc.***, 298 F.2d 893, 896 (9th Cir. 2002). "We also must consider all inferences favoring the non-moving party that a trier of fact could reasonably draw from the evidence." ***Ileto v. Glock, Inc.***, 349 F.3d 1191, 1200 (9th Cir. 2003).

public in a false light – tortiously invading his privacy. (Complaint, ¶ 12)

The false light in which Adams was placed was highly offensive to him and would be highly offensive to a reasonable person in his position. (Complaint, ¶ 13) In giving this publicity to matters about Adams, the FAA's officers, employees and/or agents had knowledge of and/or acted in reckless disregard as to the falsity of the publicized matter and the false light in which Adams would be placed. (Complaint, ¶ 14) As a result of the false light invasion of his privacy, Adams has suffered harm to his interest in privacy, mental distress of the kind that normally results from such an invasion, and special damages of which the invasion of his privacy is the legal cause. (Complaint, ¶ 15)

Adams was unaware of what the FAA had done until January 2002, when a friend showed to Adams a videotape of a local television program that broadcast the subject false information in the Phoenix metropolitan area.[2] (Complaint, ¶ 16) Based on this new – for him – information, Adams investigated further and confirmed that he had indeed been placed in a false light and his privacy invaded. (Complaint, ¶ 17) Adams filed a timely administrative claim with the FAA and then, when that was denied, filed a timely lawsuit. Then, when that did not work, Adams filed a timely complaint with the district court.

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[2] No statute of limitations issues are before this Court, since the trial court ***exclusively*** decided this case using its "false light is the same as defamation" theory.

Proceedings in the lower courts

The proceedings were long on the calendar, but short on events. On August 1, 2003, Adams sued the United States in the United States District Court for the District of Arizona, alleging that the United States had committed the tort of false light invasion of privacy against him.

On October 14, 2003, the United States filed a motion to dismiss the case for lack of subject matter jurisdiction, claiming that the false light tort was merely defamation, whatever the substantive law of the State of Arizona said.

There was no oral argument on the motion to dismiss. On August 12, 2004, the district court signed and filed its order and judgment granting the motion and dismissing the lawsuit. Adams filed a timely notice of appeal to the Ninth Circuit on August 25, 2004.

On June 28, 2006, the Ninth Circuit affirmed the district court. On August 10, 2006, the Ninth Circuit denied the petition for rehearing and the petition for rehearing en banc.

REASONS FOR GRANTING THE PETITION

There is a compelling reason to grant this Petition. The lower courts have completely ignored the FTCA's requirement that federal courts in an FTCA case must follow the substantive law of the jurisdiction where the tort occurred. Some states consider defamation and false light invasion of privacy to be the same tort. Not Arizona, however, and its substantive law controlled this case. Or, rather, it was supposed to control this case.

If the lower courts are allowed to craft their own preferred substantive tort law for FTCA cases, they will be directly violating the requirement that the substantive tort law of the state where the tort occurred must be applied. Congress clearly intended that substantive state law would apply, knowing that the tort laws of the states of the nation differed in many ways. If the lower courts are allowed to deviate from the standard Congress adopted, the congressional scheme will be destroyed. This case is a good place to stop such deviation before it is endemic.

I. UNDER THE FTCA, ARIZONA SUBSTANTIVE TORT LAW CONTROLS

The law of the jurisdiction where the tort occurred provides the substantive law controlling liability under the FTCA.[3] Indeed, district courts have jurisdiction over civil actions against the United States for personal injury ***only*** "under circumstances where the United States, if a private person, would be liable to the claimant **in accordance with the law of the place where the act or omission occurred.**"[4]

This Court has "consistently held that § 1346(b)'s reference to the 'law of the place' means law of the State – the source of substantive liability under the FTCA."[5] "FTCA actions are governed by the substantive law of the state in

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[3] ***Sosa v. Alvarez-Machain***, 542 U.S. 692, 704-08 (2004).

[4] ***28 U.S.C. § 1346(b)*** (emphasis added).

[5] ***FDIC v. Meyer***, 510 U.S. 471, 477 (1994).

which the 'act or omission occurred.'"[6] Since these "injuries occurred in the State of Arizona, **we *must* look to that State's law in evaluating his claim.**"[7]

The FTCA was ***never*** intended to create a uniform substantive federal common law describing or limiting the torts for which the United States is liable. Instead, "the FTCA's basic thrust was decidedly not to create a federal common law of torts, but rather – as expressed in the final clause of section 1346(b)(1) and in section 2674 – to tie the government's liability – albeit subject to a host of qualifications – to the disparate and always evolving tort law of the several states."[8]

Congress "expressly negated any possible inference that federal courts were to exercise any 'common lawmaking' power to fashion torts under the Act in the interest of national uniformity."[9] In fact, Congress designed the FTCA to tolerate "a great deal of variation from state to state in whether behavior will be considered tortious."[10]

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[6] ***McGraw v. United States***, 281 F.3d 997, 1003 n. 2 (9th Cir.), ***as amended***, 298 F.3d 754 (9th Cir. 2002) "Under the FTCA, suits against the United States are governed by the substantive law of the place where the act or omission complained of occurred." ***Yako v. United States***, 891 F.2d 738, 745 (9th Cir. 1989).

[7] ***Miller v. United States***, 945 F.2d 1464, 1466 (9th Cir. 1991) (emphasis added).

[8] ***Devlin v. United States***, 352 F.3d 525, 532 (2d Cir. 2003).

[9] ***Birnbaum v. United States***, 588 F.2d 319, 327-28 (2d Cir. 1978).

[10] ***Syms v. Olin Corp.***, 408 F.3d 95, 108 (2d Cir. 2006).

When the district court manufactured a federal common law doctrine denying that false-light invasion of privacy was separate, distinct and different from defamation, it was violating the FTCA's unequivocal mandate to follow Arizona's substantive tort law. Here, the false-light tort occurred in Arizona. That is where the false light information was disseminated, where Plaintiff viewed the false light information and where Plaintiff suffered the emotional injury as a result of the false-light information. The substantive tort law of Arizona thus controls.[11]

II. UNDER ARIZONA LAW, DEFAMATION AND FALSE LIGHT INVASION OF PRIVACY ARE DISTINCT, SEPARATE TORTS.

In ***Godbehere v. Phoenix Newspapers, Inc.***,[12] the Arizona Supreme Court explained in detail that the false-light tort and the defamation tort were separate, distinct and different. As the Court more fully explained: "Although both defamation and false light invasion of privacy involve publication, the nature of the interests protected by each action ***differs substantially***. A defamation action compensates damage to reputation or good name caused by the publication of false information. To be defamatory, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach plaintiff's honesty, integrity, virtue, or reputation. . . . Privacy, on the other hand, does

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[11] In a FTCA case, the court must apply the substantive law of the state, as interpreted by that state's supreme court. ***Pacheco v. United States***, 220 F.3d 1126, 1129 (9th Cir. 2000).

[12] ***Id.*** (citations omitted; emphasis added).

not protect reputation but protects mental and emotional interests." [13] The Arizona Supreme Court added:

> Thus, although **defamation and false light** often overlap, they **serve very *different* objectives. The two tort actions deter *different* conduct and redress *different* wrongs**. A plaintiff may bring a false light invasion of privacy action even though the publication is not defamatory, and even though the actual facts stated are true. Several examples in comment b to Restatement § 652E also illustrate the practical differences between a false light action and defamation and demonstrate how, in a certain class of cases, the false light action is the only redress available. **It is these considerations, we believe, that lead the vast majority of other jurisdictions, including the United States Supreme Court, to recognize the *distinction* between defamation and false light.** [14]

The Arizona Supreme Court specifically held that the false-light tort was a "***distinct tort***." *Id.* at 342, 783 P.2d at 788 (emphasis added).[15] Indeed, this Court agrees. "The differences between these two torts are important. [The] State's interests in providing a cause of action in each instance

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[13] 162 Ariz. 335, 341, 783 P.2d 781, 787 (1989).

[14] ***Id.*** at 341-42, 783 P.2d at 787-88 (footnotes and citations omitted; emphasis added).

[15] ***Id.*** at 342, 783 P.2d at 788 (emphasis added). In some states, the false light tort is apparently regarded as "in substance equivalent to a libel claim." ***Solano v. Playgirl, Inc.***, 292 F.3d 1078, 1083 n.2 (9th Cir. 2002) (California law) (citation omitted). However, that is definitely ***not*** the substantive law of the State of Arizona.

are different."[16] Even the Ninth Circuit recognized that in other jurisdictions – Nevada for instance – false light is a tort distinct, different and separate from defamation.[17]

When the lower courts in our case concluded that false light and defamation are the same, they ignored substantive Arizona law, which they were obligated to follow under the FTCA. If Arizona considers false light to be a separate, distinct and different tort as a matter of substantive state law, the lower courts cannot decide to the contrary. Under the FTCA, the lower courts had a clear, mandatory duty to apply substantive Arizona tort common law. They breached that duty.

III. IN AN FTCA CASE, FEDERAL COURTS CANNOT IGNORE SUBSTANTIVE STATE TORT LAW – OR SELECT THE TORT LAW THEY WOULD PREFER TO USE.

The FTCA forbids claims against the United States for "libel [or] slander."[18] But Adams is ***not*** suing the United States for libel, slander or any species of defamation. Adams is suing for false light invasion of his privacy. This is, as noted above, a separate and distinct tort in Arizona. Under the FTCA's express terms, the lower courts were required to hold the United States liable in accordance with the substantive tort law of the State of Arizona – as "the place

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[16] *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 462, 573 (1977).

[17] *Flowers v. Carville*, 310 F.3d 1118, 1132-33 (9th Cir. 2002).

[18] *28 U.S.C. § 2680(h)*.

where the act or omission occurred."[19] "We believe that it would be difficult to conceive of any more precise language Congress could have used to command application of the law of the place where the negligence occurred than the words it did employ in the Tort Claims Act."[20]

Instead of applying the law of the State of Arizona, the district court held that it could ignore the separate, distinct and different nature of the false-light tort, asserting that the Ninth Circuit "looks beyond the labels used to determine whether a proposed claim is barred." ***Thomas –Lazear v. FBI***, 851 F.2d 1202, 1207 (9th Cir. 1988). ***Thomas-Lazear*** actually concluded that, if a tort is simply "nothing more than a restatement of" another tort, then that tort will be barred if the original tort is also barred. ***Id.*** In other words, ***Thomas-Lazear*** looked at the substance of the claim, and not just at its label or restatement.

Our case is ***not***, however, a matter of label or restatement. "False light" is ***not*** a "label" or "restatement" of libel, slander or defamation. As a matter of substantive, fundamental Arizona law, "false light" is a different, distinct and separate tort from slander, libel and defamation. The legal theory, damages and consequences of the torts are different. Substantive Arizona law treats, applies and analyzes these torts differently. They are not the same. Nor is Arizona law some sort of aberration. Many other courts

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[19] ***28 U.S.C. § 1346(b)***.

[20] ***Richards v. United States***, 369 U.S. 1, 9 (1962).

treat false-light invasion of privacy as a separate, distinct, and different tort.[21]

The wisdom or correctness of making distinctions between false light and defamation is not what is at issue here. Whether good or bad, wise or foolish, right or wrong, the Arizona Supreme Court has decided that – under the substantive law of the State of Arizona – the false-light invasion of privacy tort is a separate, different and distinct tort that is ***not*** the same as defamation.

This Court, and all lower courts, ***must*** honor that substantive law, and can neither develop a federal common law for this issue nor substitute a "better" legal standard in place of the one developed and implemented by the Arizona Supreme Court.[22] The substantive law of the State of Arizona is the law that must be applied and followed. It is that simple.

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[21] ***See, e.g., Wood v. Hustler Magazine, Inc.***, 735 F.2d 1084, 1088 (5th Cir. 1984), ***cert. denied***, 469 U.S. 1107 (1985) ("We acknowledge the kinship of defamation to a false light claim, but we see them as distinct torts involving different injuries."); ***Machleder v. Diaz***, 801 F.2d 46, 55-56 (2d Cir. 1986), ***cert. denied***, 479 U.S. 1088 (1987) (The "important differences" between false light and defamation establish them as separate torts.).

[22] "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered, that is a function for the same body that adopted it." ***United States v. Muniz***, 374 U.S. 150, 166 (1963).

CONCLUSION

A 1977 case from the federal district court in Hawaii explained all of this very well:

> If Congress had intended to include invasion of privacy among the other enumerated intentional torts in Section 2680(h), it could have done so [in 1974] when it amended the statute. Invasion of privacy is not such a new cause of action, as the Government implies, that it can now be presumed to catch Congress by surprise.[23]

That makes sense. After all, Congress has never made any exception to federal liability for the invasion of privacy tort, which has been recognized as a unique and separate tort since at least 1890.[24] Because Congress has made no exception to liability for the tort of false light invasion of privacy, neither the district court nor any other federal court has the right to create one.

The FTCA will only continue to function as Congress intended if the lower courts are willing to apply the

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[23] ***Cruikshank v. United States***, 431 F. Supp. 1355, 1360-61 (D. Haw. 1977). ***See also Gross v. United States***, 508 F. Supp. 1085, 1090 (D.S.D. 1981) (Due to "the detailed listing and the absence of general terms only the torts mentioned in [28 U.S.C. § 2680(h)] are to be excluded.").

[24] ***See*** Samuel D. Warren and Louis D. Brandeis, ***The Right to Privacy***, 4 Harv. L. Rev. 193 (1890) and William Prosser, ***Privacy***, 48 Cal. L. Rev. 383 (1960). Arizona first recognized a cause of action for invasion of privacy in 1945. ***Reed v. Real Detective Publishing Co.***, 53 Ariz. 294, 162 P.2d 133 (1945).

substantive law of the jurisdiction where the tort occurred – even if the lower courts might invent or choose different substantive tort law were they free to do so.

Petitioner Al Adams thus respectfully asks the Court to grant the Petition for Writ of Certiorari, to vacate the lower court rulings dismissing his FTCA action, and to remand this case for proceedings on the merits.

Respectfully Submitted,

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November 2006

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16702

[FiledAugust 10, 2006]

ALFRED M. ADAMS,	)
an Arizona resident and citizen,	)
Plaintiff - Appellant,	)
v.	)
UNITED STATES OF AMERICA,	)
Defendant - Appellee.	)
	)

Appeal from the United States District Court
for the District of Arizona
D.C. No. CV-03-01480-ROS
Roslyn O. Silver, District Judge, Presiding

Before: RYMER and T.G. NELSON, Circuit Judges, and KING,* Senior Judge.

The petition for rehearing and the petition for rehearing en banc is DENIED.

* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16702

[Filed June 28, 2006]

ALFRED M. ADAMS,	)
an Arizona resident and citizen,	)
Plaintiff - Appellant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
Defendant - Appellee.	)
	)

Appeal from the United States District Court
for the District of Arizona
D.C. No. CV-03-01480-ROS
Roslyn O. Silver, District Judge, Presiding

MEMORANDUM*

Before: RYMER and T.G. NELSON, Circuit Judges, and KING,** Senior Judge.

Alfred M. Adams appeals the district court's dismissal of his claim under the Federal Tort Claims Act (FTCA)[1] for lack of jurisdiction. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The district court correctly determined that Adams's claim for false light invasion of privacy arose out of defamation as that tort is traditionally defined.[2] The dissemination of false information underlies Adams's claim as well as the traditional tort of defamation.[3] Accordingly, the FTCA does not waive

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

[1] 28 U.S.C. §§ 2671-80.

[2] *See* 28 U.S.C. § 2680(h); *Sheehan v. United States*, 896 F.2d 1168, 1169-72 (9th Cir. 1990) (noting that, when construing the meaning of the torts enumerated by 28 U.S.C. § 2680, the court looks to the "traditional" meaning of the tort "commonly understood" or "established" at the time Congress enacted the FTCA).

[3] Our inquiry focuses not on Adams's characterization of his claim, but on the conduct underlying it. *Sheehan*, 896 F.2d at 1171; *Block v. Neal*, 460 U.S. 289, 296-97, 103 S. Ct. 1089, 75 L. Ed. 2d 67 (1983); *United States v. Neustadt*, 366 U.S. 696, 705-08, 81 S. Ct. 1294, 6 L. Ed. 2d 614 (1961).

the United States's sovereign immunity as to Adams's claim,[4] and the district court therefore lacked jurisdiction.

AFFIRMED.

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[4] 28 U.S.C. § 2680(h).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV-03-1480-PHX-ROS

[Filed August 12, 2004]

ALFRED M. ADAMS,	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
Defendant.	)
	)

JUDGMENT

_XX_ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this Court having granting Defendant's Motion to Dismiss [11], this case is dismissed with prejudice, Plaintiff take nothing. This Complaint and action are hereby dismissed.

DATED at Phoenix, Arizona, this 12th day of August, 2004.

RICHARD H. WEARE
DCE/Clerk of Court

By:/s/_____
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV-03-1480-PHX-ROS

[Filed August 12, 2004]

ALFRED M. ADAMS,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER

Plaintiff Alfred M. Adams brought a claim for false light invasion of privacy under the Federal Torts Claims Act ("FTCA"), 28 U.S.C. §§ 2671, *et seq.* against the United States for alleged conduct of employees of the Federal Aviation Administration ("FAA"). Defendant United States of America moves to dismiss Plaintiff's claim for lack of subject matter jurisdiction and failure to state a claim[1]

[1] Defendant also seeks dismissal alleging the statute of limitations has run. (Doc. #7 [Mot. to Dismiss]). Because the Plaintiff's claim is dismissed for lack of subject matter jurisdiction,

pursuant to Fed. R. Civ. P. 12(b)(1) and (6). (Doc. # 7 [Mot. to Dismiss]). Defendant avers the Court lacks subject matter jurisdiction because Plaintiff's claim is barred under 28 U.S.C. § 2680 (h), the "intentional torts" exception to the FTCA, and that the Plaintiff has stated no other ground for relief. (Doc.# 7 [Mot. to Dismiss]).

I. BACKGROUND

For purposes of Defendant's Motion, the Court assumes all facts alleged by Adams to be true. *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d. 1036, 1037 n.1 (9th Cir. 2003). Also, the Court assumes all facts necessary to support Adams's allegations. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994).

On or about November 7, 1992, Plaintiff piloted an airplane that suffered mechanical failure and required an emergency landing as it approached Sky Harbor International Airport in Phoenix, Arizona. (Doc.# 1 [Compl.]). Plaintiff overcame the mechanical failure and landed the plane safely. *Id.* Thus, Plaintiff successfully saved the airplane from severe damage and saved the lives of his passenger. *Id.*

After an investigation, the FAA released information that faulted Plaintiff for the incident. *Id.* Television stations in the Phoenix metropolitan media reported on the information furnished by the FAA. *Id.* Plaintiff was ignorant of such publication for more than nine years. *Id.* In January 2002, Plaintiff first saw the previously televised broadcast after a friend showed him a videotaped version. *Id.* Plaintiff investigated the alleged false publicity and filed this cause of

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the Court will not address the statute of limitations argument.

action alleging his privacy was invaded by the FAA's public communication of false information to the media, which placed Plaintiff in a false light. *Id.* Plaintiff avers that such false light caused him to suffer emotional distress, and the communication of false information was done by the FAA in knowing and/or reckless disregard of the falsity of the publicized matter. *Id.*

Plaintiff filed his Complaint on August 1, 2003, (Doc. # 1 [Compl.]), Defendant moved to dismiss on October 14, 2003, arguing the claim was barred by the FTCA as defamatory conduct under the libel and slander exception. (Doc. # 7 [Mot. to Dismiss]). Plaintiff filed a response on October 27, 2003, which argued that false light invasion of privacy is distinct from defamation and therefore cognizable under FTCA. (Doc.# 9 [Resp. to Def.'s. Mot. to Dismiss]).

II. DISCUSSION

The Court considers whether Plaintiff has properly pled a cognizable claim under the FTCA for compensation of damages. The Court concludes that Plaintiff's claim is not cognizable.

A. Legal Standards on Motion to Dismiss

A court may dismiss a complaint for failure to state a claim if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Barnett v. Centoni*, 31 F.3d 813 (9th Cir. 1994); Fed. R. Civ. P. 12(b)(6). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988); see William W. Schwarzer et al., *Federal Civil*

Procedure Before Trial § 9:187, at 9-46 (2002). Additionally, dismissal may be appropriate when the plaintiff has included sufficient allegations disclosing some absolute defense or bar to recovery. *See Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783, n.1 (9th Cir. 1997)("If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other . . . evidence on summary judgment establishes the identical facts.").

B. 28 U.S.C. § 2680(h) Bars Claims Arising From Libel and Slander.

The United States is immune from suit and can only be sued where Congress waives immunity. *United States v. Orleans*, 425 U.S. 807, 814 (1976). Congress waived sovereign immunity, under limited circumstances, when it passed the FTCA. 28 U.S.C. §§ 1346(b), 2671-2680. Section 2680(h) of the FTCA bars claims arising from the commission of libel and slander. *Thomas-Lazear v. F.B.I.*, 851 F.2d 1202, 1206-07 (9th Cir. 1988). Defamatory communication is also barred because defamation arises from libel and slander. *Jimenez-Nieves v. United States*, 682 F.2d 1, 6 (1st Cir. 1982); *Cooper v. American Auto Ins.*, 978 F.2d 602, 613 (10th Cir. 1992).

1. Plaintiffs claim arises from the FAA's defamatory conduct.

The relevant inquiry to determine if a claim is barred by § 2680(h) is whether the claim arises from governmental conduct that is a commission of an enumerated tort. *Sheehan v. United States*, 896 F.2d 1168, 1171-72 (9th Cir. 1990); *Thomas-Lazear*, 851 F.2d at 1206-07. Plaintiff labels his claim against Defendant as "false light invasion of privacy" and alleges it does not fall within § 2680(h) (Doc. # 9

[Response to U.S. Mot. to Dismiss], pp. 2-3), however, "this circuit looks beyond the labels used to determine whether a proposed claim is barred." *Thomas-Lazear*, 851 F.2d at 1206-07; *see also United States v. Neustadt*, 366 U.S. 696 (1961) (holding that plaintiff's negligence claim, which was based on misrepresentations by the Government, was barred because the claim arose out of misrepresentation by the Government, which is the commission of an enumerated tort of § 2680(h)).

In *Thomas-Lazear*, 851 F.2d at 1203, the plaintiff alleged that Government officials conspired to defame her by making false statements. The plaintiff attempted to amend her complaint to add the claim of negligent infliction of emotional distress,[2] but the district court denied the motion when it concluded her claim was barred by §2680(h). *Id.* at 1206. On appeal, the Ninth Circuit looked to the conduct of the Government to determine if the claim was barred. *Id.* at 1206-07. The Court found that the Government conduct described in the plaintiff's complaint was slanderous; and the slanderous conduct was essential to the plaintiff's claim for negligent infliction of emotional distress. *Id.* The court further scrutinized the complaint but found "there [was] no other government conduct upon which such claims [could] rest." *Id.* Therefore, the court ruled the claim for negligent infliction of emotional distress was barred, because the claim arose from slander, the defamatory conduct described in the complaint. *Id.*

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[2] Additionally, the plaintiff attempted to assert false light invasion of privacy against the Government, but the district court also denied that claim, because the court found it was excluded by § 2680(h) as slander. *Thomas-Lazear v. F.B.I.*, 851 F.2d at 1204. On appeal, the plaintiff did not press her claim for false light invasion of privacy. *Id.* at 1206.

Here, Plaintiff describes the essential conduct of the Government as "wrongfully disclos[ing] . . . incorrect and damaging information", and as acting in "disregard as to the falsity of the publicized matter." (Doc. # 1 [Compl.] ¶¶ 10, 11 and 14). Like *Thomas-Lazear*, Plaintiff's description of the Government's conduct supports a state claim for defamation. *See Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 787 (Ariz., 1989) (the publication of false information is defamatory). Further, like *Thomas-Lazear*, Plaintiff has stated no other Government conduct upon which his claim can rest, because the defamatory conduct is the only conduct described in the Complaint that allegedly invaded his privacy. Thus, Plaintiffs claim for false light invasion of privacy is absolutely barred by the libel and slander exception of § 2680(h). Other courts have reached the same conclusion and held that false light invasion of privacy is barred by the libel and slander exception of § 2680(h). *See Johnson v. Sawyer*, 47 F.3d 716, 732 n. 34 (5th Cir. 1995)(*en banc*); *Metz v. United States*, 788 F.2d 1528, 1535 (11th Cir. 1986); *O'Ferrell v. United States*, 253 F.3d 1257, 1265-66 (11th Cir. 2001); *Bosco v. U.S. Army Corps. of Engrs*, 611 F. Supp. 449, 452-53 (N.D. Tex. 1985); *Hobody v. United States*, 762 F. Supp. 1459, 1462 (D. Kan. 1991), *aff'd*, 968 F.2d 20 (10th Cir. 1992).

2. Plaintiff's claim does not circumvent § 2680(h).

Plaintiff argues that the tort of false light invasion of privacy is distinct from defamation, and therefore it is not barred. (Doc. # 9 [Resp. to Def's. Mot. to Dismiss]). Plaintiff attempts to distinguish between the interest to privacy protected by false light invasion of privacy from the injury to reputation protected by defamation. *Id.* Just as the label of the claim is irrelevant, the interest protected by a claim is also irrelevant because the governmental conduct is the focus of inquiry. *Sheehan*, 896 F.2d at 1171-72; *Thomas-Lazear*, 851

F.2d at 1206-07. In *Thomas-Lazear*, the plaintiff tried to focus her claim on whether the Government negligently inflicted emotional distress when it made the defamatory comments. 851 F.2d at 1206. The court rejected that argument as nothing more than claiming injury arising from defamation and pleading it separately as negligent infliction of emotional distress. *Id.*; *See also Neustadt*, 366 U.S. at 703 (holding that the characterization of a claim as negligence, rather than misrepresentation (a tort excluded under § 2680(h)), does not circumvent § 2680(h)). Similarly, Plaintiff's claim here is nothing more than a claim for the emotional damages he suffered when the Government's defamatory conduct invaded his privacy.[3] (Doc.# 1 [Compl.]). Whether categorized as negligent infliction of emotional distress or false light invasion of privacy, both are collateral claims for emotional damages that arise from the defamatory conduct of the Government, and as such they are barred.

III.CONCLUSION

The Plaintiff's claim of false light invasion of privacy is barred by § 2680(h), because the essential conduct of the Government giving rise to the claim is defamatory. Here, the Plaintiff's allegations within his Complaint provided a complete bar to his claim and no remaining allegations support his claim. Thus, the Court lacks jurisdiction over the claim asserted and Plaintiff has otherwise failed to state a claim authorized by the FTCA.

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[3] Section 2680(h) has not barred all claims for invasion of privacy when those claims were based on the Government's unlawful interception of confidential communications which intruded into the plaintiff's privacy. *Black v. Sheraton Corp. of America*, 389 F.2d 531, 540-41 (D.C. Cir. 1977).

Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss (Doc. #7) is **GRANTED**.

IT IS FURTHER ORDERED that this case be **DISMISSED WITH PREJUDICE**.

DATED: August 11, 2004

/s/_____
Roslyn O. Silver
United States District Judge